No. _____

Supreme Court, U.S.
FILED
JUN 19 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

CLIFFORD TREKAS, PETITIONER

V.

LOUIS W. SULLIVAN, SECRETARY
OF HEALTH AND HUMAN SERVICES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

ANTHONY W. BARTELS
316 South Church
P. O. Box 1640
Jonesboro, Arkansas 72401
(501) 972-5000

ATTORNEY FOR PETITIONER

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QUESTION PRESENTED

The question presented in this case is twofold: 1) Whether the Secretary of Health and Human Services should be permitted to continue to discourage adequate representation of Social Security disability claimants by not withholding funds for attorney's fees on Title II cases, but instead releasing all past due benefits, prior to the reduction for attorney's fees, to the claimants with ever-increasing frequency, making it unprofitable for attorneys to continue to represent disabled Social Security claimants; and, 2) Whether the Secretary should be held in contempt of court for his disregard of a District Court Order.

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Anthony W. Bartels petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported, but is attached hereto as Appendix A. The opinion of the district court is unreported, but is attached hereto as Appendix B. The Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc of the Court of Appeals is attached hereto as Appendix C.

JURISDICTION

The judgment of the Court of Appeals (App. 1a) was entered on May 12, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant provisions of Title II of the Social Security Act, 20 C.F.R. § 404.1720 (b) (4), 20 C.F.R. § 1730 (b), and 20 C.F.R. § 404.501 (a) (8), are set forth in the Appendix D, Page 8a through 10a.

STATEMENT

This case concerns 20 C.F.R. § 1720 and 1730, which involve fees for a representative's services on a Title II claim. In a Title II claim, the Social Security Administration is to withhold and pay the attorney's fee directly to the attorney from a claimant's past due benefits. The case also concerns 20

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1. In this case, petitioner (hereinafter claimant) had two attorneys, namely Anthony Bartels and Jim Stanley. Both attorneys represented the claimant at the administrative level, and Anthony Bartels represented the claimant at the Court level.

In December of 1985 the Social Security Administration authorized Jim Stanley to charge and receive a fee of $5,000.00 for services performed at the administrative level. This fee was later reduced by the Social Security Administration to $4,000.00.

In July of 1987, the U. S. District Court entered an Order awarding attorney's

fees and costs to Anthony W. Bartels in the amount of $3,068.30, from the past due benefits due the claimant, for time spent representing the petitioner before the Court. The Court ordered that the Secretary " . . . compute, certify and pay said attorney this sum . . . or twenty-five percent of the Plaintiff's past due benefits, whichever is less."

In May of 1988, Anthony Bartels was authorized an $800.00 administrative fee by the Social Security Administration. Therefore, the total fee owed to Anthony Bartels was the sum of $3,868.30, of which the Secretary paid the sum of $2,104.75 but advised Anthony Bartels to collect the balance of $1,763.55 directly from the claimant.

Claimant's attorney attempted to collect his fee from the claimant, but claimant had spent the funds and was unable to pay the attorney's fee. Shortly thereafter, the claimant filed bankruptcy,

which protected him from any attempt by the attorney to collect his fee.

Anthony Bartels subsequently asked that the Social Security Administration declare an overpayment, pay the balance of his fee, and collect the overpayment from the claimant, pursuant to 20 C.F.R. § 404.501 (a) (8). The Secretary refused to do so.

Anthony Bartels then moved the District Court for an injunction against the Secretary to stop the act of "inadvertently" releasing all past due benefits to the claimant before payment of attorney's fees, and moved the Court to hold the Secretary in contempt for failure to comply with the Court's 7/27/87 Order. In June of 1988, the District Court accepted the Secretary's explanation that, although he failed to withhold the remaining amount set aside for attorney's fees, such a failure was not an intentional contravention of the Court's

Order. The District Court denied the attorney's motions (App. 2a through 6a). The Court of Appeals for the Eighth Circuit affirmed (App. 1a). The attorney filed a Petition for Rehearing With Suggestion for Rehearing En Banc, but the Court of Appeals for the Eighth Circuit denied the Petition by reason of the lack of a majority of the active judges voting to rehear the case en banc (App. 7a).

REASONS FOR GRANTING THE PETITION

1. The basis for this Petition is to direct the Court's attention to actions of the Secretary of Health and Human Services which greatly discourage attorneys from representing Social Security disability claimants. With ever increasing frequency, the Secretary releases all past due benefits on Title II cases to the claimant, before such benefits have been reduced by the amount of attorney's fee payable directly to a representative attorney. The Secretary then requests

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that the attorney attempt to collect his fee from the claimant first, before the Secretary will declare an overpayment and recoup the overpayment from the claimant.

When an attorney wins a Social Security disability case, an "Award Letter" is sent to the disabled claimant on Title II cases, advising that one-fourth of his or her past due benefits must be withheld for direct payment of attorney's fees. The attorney then petitions for his fee, and after a great deal of time passes, he receives from the Secretary an "Authorization to Charge and Receive a Fee", which authorization advises simultaneously (in numerous cases) that the Secretary has "inadvertently" released all past due benefits to the claimant. The attorney is advised to collect his fee directly from the claimant. Attached as Appendix E and F are examples of two such "Authorization to

Charge and Receive a Fee", which this attorney received on two unrelated cases.

In the meantime, the claimant has received all the past due benefits and spent them, because the Secretary advised earlier in the "Award Letter" that the attorney's fee would be withheld and paid directly to the attorney. When the attorney contacts his client asking that he pay the attorney's fee, the claimant questions his attorney's ethics. Naturally the Secretary's mistake causes a "chill" between the attorney and his client.

The Secretary's time delay of approving attorney's fees, coupled with release of all past due benefits to the claimant before attorney's fees are deducted, is, to this attorney, extremely discouraging and most surely has the same affect on other attorneys who wish to represent Social Security disability claimants. These disabled claimants have

a right to adequate representation, but the Secretary's actions are endangering these rights and making it unprofitable for competent attorneys to represent disabled claimants.

To illustrate that the Secretary's action, of releasing all funds before attorney's fees are paid, has continued, and occurs with ever-increasing frequency, below are cases in which this attorney has received notices, that his fee has erroneously been released to the claimant, since this case was filed with the Court of Appeals in September of 1988:

1. 10/17/88, Billy Adams, SSN: 432-90-0735, $4,000.00 erroneously released;

2. 11/18/88, Payton Chester, SSN: 432-26-0653, $1,810.40 erroneously released;

3. 2/16/89, Shirley Clayton Lawson, SSN: 266-56-8269, $4,778.30 erroneously released;

4. 2/21/89, Sharon Ellenburg, SSN: 432-90-6777, $1,232.40 erreonously released;

5. 3/5/89, Donald Milde, SSN: 432-70-8983, $500.00 erroneously released;

6. 5/17/89, Thomas Sanderson, SSN: 494-46-4235, $4,500.00 erroneously released.

Further, this attorney has found it necessary to file a motion for contempt in District Court on yet another case, because the Secretary erreonously released part of the funds in the amount of $1,002.45 to the claimant, and failed to pay the Court-ordered attorney fee. That case is John Dover v. Secretary of HHS, U. S. District Court for the Eastern District of Arkansas, Jonesboro Division, No. J-C-83-332, filed 5/8/89. Also filed recently is the case of Anthony W. Bartels v. Secretary of HHS, U. S. District Court for the Eastern District of Arkansas, Jonesboro Division, No. J-C-89-106, which is an original proceeding asking for judgment against the Secretary in the amount of $452.45, because he had erroneously released this amount to the claimant and refused to pay the full fee awarded at the administrative level.

The Secretary's inadvertent release of the attorney's fee to the claimants has become a problem which is greatly annoying, frustrating and discouraging to this attorney in handling Social Security disability claims. And, it is not unreasonable to conclude that the Secretary's behavior would have the same affect on attorneys throughout the Country.

The purpose of an injunction is to prevent future violations. Swift and Co. v. United States, 276 U.S. 311, 326 (1928). It is, therefore, appropriate that the Court enjoin the Secretary of Health and Human Services from paying all past due benefits to the claimant before attorney's fees are paid. Unless this petition is granted on the point urged, adequate representation will surely be more and more difficult to obtain by disabled Social Security claimants who are

unable to work, and thus, have no funds to pay an attorney.

2. The second issue to be addressed is whether the Secretary of Health and Human Services should not be held in contempt of court for disobeying a District Court Order, because he alleges that his disobedience was not intentional.

In this case, the District Court ordered the Secretary to ". . . compute, certify and pay. . . " the attorney's fee and costs to Anthony W. Bartels in the amount of $3,068.30. The Secretary disobeyed the Court's instructions and paid only a portion of that attorney's fee. In his response to the motion for contempt filed against him by Anthony Bartels, the Secretary admitted that he had failed to withhold and pay the correct amount of attorney's fees, but alleged that his actions were unintentional. The District Court accepted his explanation and denied the motion for contempt.

In the Fourth Circuit case of Motley v. Heckler, 605 F. Supp. 88 (W.D. Va. 1985), rev'd on other grounds, 800 F. 2d 1253 (4th Cir. 1986), the Secretary failed to withhold past-due benefits to pay attorney's fees. The Court determined that " . . . it is not the attorney who should suffer the loss . . ." when the past due sums are released through no fault of the attorney. 605 F. Supp. at 94. The Court concluded that the attorney must look to the Secretary for payment of the fee. In so holding, the Court stated:

> "The necessary authority can be found not in Section 406 (b), but in 42 U.S.C. Section 404, which provides for the recovery of over-payments. It is up to the Secretary to pay out the total fee award that should have been withheld by [him], and then utilize the means uniquely at [his] disposal to recover any over-payment to [the claimant]."

The defendant is well aware of this procedure, yet he failed to comply with the District Court's Order to ". . . compute, certify and pay. . . " the

attorney's fee and costs to Anthony Bartels in the amount of $3,068.30. He should, therefore, be held in contempt of court. United States v. Askew, 584 F. 2d 960 (10th Cir. 1978), cert. denied, 439 U.S. 1132 (1979); Van Drivers Local No. 392 v. Neal Moving & Storage, 557 F. Supp. 187 (N.D. Ohio 1983); Baurmin v. Cournoyer, 448 F. Supp. 225 (D. Mass. 1978). The Secretary's failure to comply with the Court's Order represents a conscious indifference to the Court's authority and mandate, for which a contempt citation should be entered. See United States v. Baker, 641 F. 2d 1311 (9th Cir. 1981).

Title 18 U.S.C. Section 401 (3) provides:

> "A court of the U. S. shall have power to punish by fine or imprisonment at its discretion such contempt of its authority and none other as . . . . (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command."

The Secretary fails to realize the soundness and importance of these orders.

Though the Secretary has stated that his actions were not done intentionally, intent is not a requirement for civil contempt and therefore, lack of intent is not a defense. McGuff v. Rapone, 78 FRD 8 (1978). Only action, and not specific intent or willingness, needs to be shown to trigger the civil contempt enforcement procedure to obtain compliance. Gregory v. Mucho K. Inc., 438 F. Supp. 1117 U.S.D.C. (S.D. Fla. 1977).

The Secretary has also alleged that his actions were taken "inadvertently." The fact that prohibited acts may have been done inadvertently or in good faith does not preclude a finding of contempt. Thompson v. Johnson, 410 F. Supp. U.S.D.C. (E.D. Penn. 1976).

The Secretary has also argued that the case at bar is "clearly moot." The case is "moot" if the Secretary " . . .

can demonstrate that 'there is no reasonable expectation that the wrong will be repeated.' The burden is a heavy one." United States v. W.T. Grant, 345 U.S. 629 at 633 (1953). It must be absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur. U.S. v. Phosprate Export Ass'n, 393 U.S. 199 at 203. However, the Secretary's behavior of erroneously releasing all Title II funds to claimants prior to reduction for attorney's fees, has continued on a frequent basis, as has his failure to comply with payment of Court-ordered attorney's fees because of such erroneous release of past due benefits.

The Secretary of Health and Human Services is not exempt from the contempt process. Indeed, Fed. R. Civ. P. 45 (b) explicitly provides that " . . . any person who disobeys an order of the court may be held in contempt." For the reasons

stated above, the Secretary of Health and Human Services should be held in contempt of court.

The Secretary's actions affect a significant number of people, and unless this petition is granted on the point urged, adequate representation for Social Security disability claimants will become more difficult to obtain.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

ANTHONY W. BARTELS
Attorney at Law
316 South Church
Jonesboro, Arkansas 72401
(501) 972-5000

June 16, 1989.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2101

CLIFFORD TREKAS, APPELLANT

V.

LOUIS W. SULLIVAN, SECRETARY
OF HEALTH AND HUMAN SERVICES, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS

[FILED MAY 12, 1989]

Before FAGG, Circuit Judge, FLOYD R. GIBSON, and TIMBERS, Senior Circuit Judges.

PER CURIAM.

We have reviewed the record and conclude that an opinion will have no precedential value. We affirm for the reasons stated in the district court's order. See 8th Cir. R. 14.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

Case No. LR-C-82-619

CLIFFORD TREKAS, PLAINTIFF

V.

OTIS R. BOWEN, SECRETARY OF HEALTH
AND HUMAN SERVICES, DEFENDANT

[FILED JUNE 14, 1988]

ORDER

Pending before the Court is plaintiff's attorney's motion to hold defendant in contempt and motion for injunction. The defendant has responded. For the reasons set forth below, the Court will deny both motions.

For his motion to hold defendant in contempt, plaintiff's attorney states that the defendant failed to comply with the

Court's Order of July 27, 1987 awarding $3,008.30 in attorney's fees to movant from plaintiff's past due benefits. Plaintiff's attorney contends that instead of withholding the past due benefits to pay movant's fee, defendant released the entire sum to plaintiff and directed movant to collect his fee from plaintiff. Movant further states that plaintiff is in bankruptcy and is therefore protected from collection procedures.

The maximum attorney's fee in a social security action is 25 percent of the total of the past-due benefits to which the claimant is entitled. 42 U.S.C. § 406 (b). For his response defendant states that in this case 25 percent of plaintiff's past due benefits amount to $6,104.32 of which $4000.00 was paid to Mr. James W. Stanley, Jr., one of plaintiff's attorneys at the administrative level. Defendant further states that on May 18, 1988, $2,104.15,

the remaining available amount from plaintiff's past due benefits, was certified for payment to Mr. Bartels. Defendant further states that movant was also authorized an $800.00 administrative fee but that since this award was made after the entire 25 percent of past-due benefits had been authorized, movant was directed to collect this amount from the claimant.

Defendant concedes that he failed to withhold the remaining amount set aside for attorney fees but that said failure was not an intentional contravention of the Court's Order or an attempt to hinder plaintiff's attorney's collection of his fee. Defendant argues that since this problem was not due to misconduct on the part of defendant or his employees, and since it has been resolved as previously described, there is no basis for holding the Secretary in contempt.

The Court accepts defendant's explanation and will therefore deny plaintiff's motion. Plaintiff's attorney has not been certified a payment of $2,104.15, the maximum amount available for payment. Thus, the relief sought is no longer necessary. The Court will also deny plaintiff's attorney's motion for an injunction to require the Secretary "to stop the practice of 'inadvertently' paying all past due benefits to claimants." As stated above, the Court accepts the Secretary's explaination [sic] that he has no such "policy" and that the Social Security Administration does not intentionally attempt to contravene the Court's Orders in an attempt to hinder the collection of attorney's fees.

IT IS THEREFORE ORDERED that plaintiff's attorney's motion to hold defendant in contempt and motion for injunction, be and they are hereby, denied.

Dated this 14th day of June, 1988.

\s\Garnett Thomas Eisele
United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2101

CLIFFORD TREKAS, APPELLANT

V.

RICHARD SWEIKER, etc.,
APPELLEE

Order Denying Petition for
Rehearing and Suggestion
for Rehearing En Banc

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Petition for rehearing by the panel is also denied.

June 9, 1989

Order Entered at the Direction of the Court:

\s\Robert D. St. Vrain
Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX D

RELEVANT STATUTORY PROVISIONS

20 C.F.R. § 404.1720 (b) (4), provides in pertinent part:

> (b) **Charging and receiving a fee.** (1) The representative must file a written request with us before he or she may charge or receive a fee for his or her services.
>
> * * * *
>
> (4) If the representative is an attorney and the claimant is entitled to past-due benefits, we will pay the authorized fee, or a part of the authorized fee directly to the attorney out of past-due benefits subject to the limitations described in § 404.1730 (b) (1). If the representative is not an attorney we assume no responsibility for the payment of any fee that we have authorized.

20 C.F.R. § 404.1730 (b), provides in pertinent part:

> (b) **Fees we may authorize--(1) Attorneys.** Except as provided in paragraph (c) of this section, if we make a determination or decision in favor of a claimant who was represented by an attorney, and as a result of the determination or decision past-due benefits are payable, we will pay the attorney out of the past-due benefits the smallest of--

(i) Twenty-five percent of the total of past-due benefits;

(ii) The amount of the fee that we set; or

(iii) The amount agreed upon

between the attorney and the claimant represented.

20 C.F.R. § 404.501 (a) (8) provides in pertinent part:

(a) **In general.** Section 204 of the Act provides for adjustment as set forth in §§ 404.502 and 404.503, in cases where an individual has received more or less than the correct payment due under title II of the Act. As used in this subpart, the term "overpayment" includes a payment in excess of the amount due under title II of the Act, a payment resulting from the failure to impose deductions or to suspend or reduce benefits under sections 203, 222 (b), 224, and 228 (c), and (d), and (e) of the Act (see Subpart E of this part), a payment pursuant to section 205 (n) of the Act in an amount in excess of the amount to which the individual is entitled under section 202 or 223 of the Act, a payment resulting from the failure to terminate benefits, and a payment where no amount is payable under title II of the Act. . . . The provisions for adjustment also apply in cases where through error:

* * * *

(8) A payment of past due benefits is made to an individual and

such payment had not been reduced by the amount of attorney's fees payable directly to an attorney under section 206 of the Act (see § 404.977).

APPENDIX E

AUTHORIZATION TO CHARGE AND RECEIVE A FEE

TO: (Name and Address of Representative)

Anthony Bartels for
Payton Chester (DWE)
316 S. Church
Jonesboro, Arkansas 72401

Payton Chester (deceased)
(Claimant)

(Wage Earner) (Leave blank if same as above).
432-26-0653
(Social Security Number)
DIWC
(Type of Claim)

You are hereby authorized to charge the claimant the sum of $ 1,925.40 for your services rendered before the Social Security Administration.

NOTE: IF EITHER YOU OR THE CLAIMANT DISAGREES WITH THE AMOUNT AUTHORIZED, an administrative review may be requested by sending a letter within 30 days to:

William H. Helsper
Regional Chief Administrative Law Judge
Office of Hearings and Appeals

1200 Main Tower - Room 1135

Dallas, TX 75202
(See reverse side for additional details)

The paragraph(s) checked below refer to payment of your authorized fee:

[XX] A check will be sent to you from the past-due benefits. If you have any

questions concerning the status of the check, write to (See Remarks Below)* SSA, Mid-America Program Svc. Center, Reconsideration Section, P. O. Box 15487, Kansas City, MO 64106

[X] Since the amount withheld is less than the authorized fee, you will have to look to the ~~claimant~~/ survivors for any balance due.

[ ] You will have to look to the claimant for the authorized fee, since the law does not permit payment from the claimant's funds if (1) there are no past-due benefits; (2) the representative is not an attorney; or (3) the claim is for supplemental security income.

[XX] *All retro-benefits, except for $115.50, were released to the three survivors as underpayments. This release of funds was in error. (The three survivors are aware that the attorney's fee has not been paid).

/s/Newbern Chambers
(Signature)
NEWBERN CHAMBERS
(Typed Name)
Administrative Law Judge
(Title)
18 NOV 1988
(Date)

cc: (Name and Address of Claimant)

(Claimant deceased)

SEE REVERSE SIDE FOR OTHER IMPORTANT INFORMATION

Form HA-L530-U5 (6/85)
Prior editions may be used

APPENDIX F

DEPARTMENT OF HEALTH AND HUMAN SERVICES
Social Security Administration
Office of Hearings and Appeals

AUTHORIZATION TO CHARGE AND RECEIVE A FEE

Anthony W. Bartels
Attorney at Law
P. O. Box 1640
Jonesboro, AR 72403-1640

Shirley Clayton Lawson
(Claimant)

(Wage Earner)(Leave blank if same as above).
266-56-8269
(Social Security Number)
DIB
(Type of Claim)

You are hereby authorized to charge the claimant the sum of $ 3,100.00 for your services rendered before the Social Security Administration.

NOTE: IF EITHER YOU OR THE CLAIMANT DISAGREES WITH THE AMOUNT AUTHORIZED, an administrative review may be requested by sending a letter within 30 days to:

Office of Hearings and Appeals
Attorney Fee Branch
Post Office Box 3200
Arlington, Virginia 22203
(See the attached sheet for additional details.)

The paragraph(s) checked below refer to payment of your authorized fee:

[X] We have considered the matter thoroughly in accordance with the regulatory criteria. Based thereon,

the requested fee was reduced to the amount shown above as being more commensurate with the services performed before the Social Security Administration.

[X] The subject of out-of-pocket expenses is a matter for settlement between attorney and client and is not subject to approval by the Administration.

[X] Inadvertently, no past-due benefits were withheld to facilitate the payment of the authorized fee. Accordingly, you should look to the claimant for payment. If you have any difficulty in collecting the fee, please notify the Office of Disability and International Operations, P. O. Box 17295, Baltimore, MD. 21235, and appropriate action will be taken to make payment of the authorized fee (to the extent that it does not exceed 25% of the past-due benefits.)

AUTHORIZING OFFICIAL:

\s\Beverly Walker
(Signature)
Beverly Walker
(Typed Name)
Acting Attorney Fee Officer
(Title)
APR 20 1989
(Date)

Shirley C. Lawson
P. O. Box 163
Leachville, AR 72438

Attachment

Supreme Court, U.S.
FILED
AUG 25 1989

No. 88-2069

In the Supreme Court of the United States

OCTOBER TERM, 1989

CLIFFORD TREKAS, PETITIONER

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in refusing to enjoin the Secretary of Health and Human Services from failing to withhold part of the benefits due social security claimants for payment directly to their attorneys, or to hold the Secretary in contempt, when petitioner's attorney had received direct payment of the maximum allowable amount.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a) and the orders of the district court (Pet. App. 2a-6a; App., *infra*, 1a-3a) are not yet reported.[1]

JURISDICTION

The decision of the court of appeals was entered on May 12, 1989. A petition for rehearing was denied on June 9,

[1] The district court order of June 14, 1988, as reproduced in the Appendix to the petition contains an apparent typographical error, substituting "not" for "now" in the second sentence on page 5a. As the context indicates, the district court actually wrote: "Plaintiff's attorney has now been certified a payment of $2,104.15, the maximum amount available for payment." That statement is consistent with the district court's earlier factual explanation (correctly reproduced at Pet. App. 3a-4a). The petition itself states that counsel was in fact paid $2,104.75 directly by the Secretary in May 1988 (Pet. 4).

1989 (Pet. App. 7a). The petition for a writ of certiorari was filed on June 19, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

Title 42, Section 406(b)(1) provides in relevant part:

> Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may * * * certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

STATEMENT

1. Petitioner Trekas sought judicial review of an August 3, 1983, decision of the Appeals Council of the Social Security Administration denying him disability benefits, and on April 25, 1984, the district court remanded the case to the agency for further consideration (April 25, 1984 Order at 2). After additional administrative proceedings, petitioner was awarded Social Security disability insurance benefits and Supplemental Security Income benefits under Titles II and XVI, respectively, of the Social Security Act, 42 U.S.C. 401-433, 1381 *et seq.*, in a decision of the Appeals Council on September 17, 1985. The award included $24,417 in past-due benefits. In accordance with 42 U.S.C. 406, 25 percent of that amount, $6,104, was re-

tained by the Secretary for payment of any award of attorney fees. Sept. 17, 1985 Appeals Council Decision; Gov't C.A. Br. 3.

Petitioner was represented both in the agency proceedings in 1983 and before the district court by attorney Anthony Bartels until Bartels was dismissed by petitioner on February 9, 1984 (App., *infra,* 2a). Thereafter, attorney James Stanley represented petitioner on the remand proceedings before the agency. After the Appeals Council award, attorney Stanley sought direct payment out of the accrued back benefits of an attorney fee for his work before the agency, in accordance with 42 U.S.C. 406(a).[2] In December 1985, the Secretary certified a payment to him of $5,000 out of the retained portion of claimant's accrued back benefits (Gov't C.A. Br. 3).[3]

In December 1986, 15 months after the award of disability benefits to petitioner, the agency paid petitioner the remaining $1,104 of his accrued benefits. Gov't C.A. Br. 3.

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[2] Section 406(a) provides in pertinent part that:

> Whenever the Secretary, in any claim before him for benefits under this subchapter, makes a determination favorable to the claimant, he shall, if the claimant was represented by an attorney in connection with such claim, fix * * * a reasonable fee to compensate such attorney for the services performed by him in connection with such claim. If as a result of such determination, such claimant is entitled to past-due benefits under this subchapter, the Secretary shall * * * certify for payment (out of such past due benefits) to such attorney an amount equal to whichever of the following is the smaller: (A) 25 per centum of the total amount of such past due benefits, (B) the amount of the attorney's fee so fixed, or (C) the amount agreed upon between the claimant and such attorney as the fee for such attorney's services. * * *

[3] When petitioner objected to the size of this award, the Secretary reduced it to $4,000, and in October 1986 directed Stanley to pay the $1,000 overpayment to petitioner. Gov't C.A. Br. 3.

Meanwhile, on January 20, 1986, attorney Bartels filed a request with the United States District Court for the Eastern District of Arkansas for an attorney fee for work done in the judicial proceedings leading to the remand in April 1984. Motion for Attorney Fees. On July 27, 1987, the court concluded that Bartels no longer represented petitioner after February 9, 1984, but awarded him a fee of $3,008.30 for judicial representation before that time. App., *infra,* 2a.[4] After noting that the agency, not the court, had the authority to award fees for work performed at the agency level, and that "the maximum [of the court awarded and the administrative fees may] not exceed twenty-five percent of the plaintiff's past due benefits" the court directed the Secretary to pay Bartels the sum awarded plus any sums awarded for representation before the agency, out of petitioner's accrued back benefits, or to award Bartels "twenty-five percent of the plaintiff's past due benefits, whichever sum is less." App., *infra,* 3a. On August 3, 1987, Bartels applied for fees for his representation of petitioner before the agency, and the agency concluded that Bartels was entitled to a fee of $800 for work performed at the administrative level. May 2, 1988 Charge Authorization Form.[5]

Because all of petitioner's accrued back benefits had been paid over to him some 7 months before the date of the district court's order awarding fees, the Secretary was unable to pay that award "out of" those benefits. Nevertheless, on May 18, 1988, the Secretary made payment directly to

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[4] The court declined to award fees under the Equal Access to Justice Act, 28 U.S.C. 2412(d)(1)(A) (Supp. V 1987), finding that the Secretary's decision to deny petitioner's claim for benefits had been substantially justified. App., *infra,* 3a.

[5] The administrative fee authorization was increased to $2,000 in August 1988, after Bartels protested the amount of the fee awarded and provided further justification for a larger fee. Letter from Burton Berkley to Anthony W. Bartels (Aug. 12, 1988).

Bartels of $2,104, the difference between the amount ultimately awarded attorney Stanley and 25 percent of plaintiff's back benefits.[6] Bartels was advised to collect the balance of his authorized fee from petitioner. Pet. App. 3a-4a.

On May 5, 1988, attorney Bartels moved in this case for an injunction to stop the Secretary from "inadvertently" releasing all past-due benefits to beneficiaries, and for an order holding the Secretary in contempt for not paying the entire fee directly to Bartels. The district court denied the motion for contempt, finding that the Secretary had paid $2,104 to Bartels and that this amount was the maximum amount available for payment (Pet. App. 5a; see note 1, *supra*). The district court also denied the motion for an injunction, finding that the Secretary had no policy of improperly releasing all past-due benefits to beneficiaries. The court of appeals adopted the reasoning of the district court and affirmed its order (Pet. App. 1a).

ARGUMENT

Petitioner asks this Court to review the refusal of the courts below either to enjoin the Secretary from failing to withhold future benefits due petitioner to pay attorney fees, or to hold the Secretary in contempt for failing to pay his former attorney his full fees by withholding future benefits from petitioner.

1. It is far from clear that there is a proper petitioning party in this case. Not only has the named petitioner, Trekas, long since directed Bartels, who filed the petition, to stop representing him (App., *infra*, 2a), but also Trekas's interests are antithetical to the position urged in

[6] The Secretary informs us that he subsequently waived recoupment of that sum from petitioner. See 42 U.S.C. 404(b).

the petition—that the Secretary should be directed to withhold future benefits due Trekas for payment directly to his former attorney, Bartels.[7] Indeed, if Trekas were to be represented in this case in this Court, he would undoubtedly appear as a respondent, not a petitioner. Attorney Bartels evidently recognizes that he is filing the petition on his own behalf, not in a representative capacity. See Pet. 1, 8-11. We are aware of no case that suggests that he is a proper party to proceedings in this Court, still less that he is entitled to petition this Court, in his former client's name, for review of issues resolved below in that client's favor. Cf. *Diamond* v. *Charles,* 476 U.S. 54, 69-71 (1986). Moreover, the propriety of his attempt to assert interests so clearly at odds with those of his former client might well be questioned. In any event, the issues he presents are so evidently without merit that no further review is appropriate in this case.

2. Bartels is entitled to no further direct payments from the Secretary for his representation of petitioner in this case. Pursuant to 42 U.S.C. 406(b)(1), a court can award, and the Secretary can pay over directly, no more than 25 percent of a claimant's past-due benefit for attorney fees for representation in court. This limitation is designed to assure that the claimant gets the bulk of the back benefit payment. S. Rep. No. 404, 89th Cong., 1st Sess. 122 (1965). It would be inconsistent with that statutory purpose to read the statute as permitting each of several attorneys of a single claimant to recover the full 25 percent award. Cf. *Guido* v. *Schweiker,* 775 F.2d 107, 108 (3d Cir. 1985). Nor do we read the petition as arguing that

[7] Since the Secretary has waived recoupment from petitioner of the amounts paid directly to Bartels (see note 6, *supra*), the Secretary's actions on the issues here in dispute are highly favorable to petitioner.

the statute should be so interpreted.[8] Accordingly, the maximum amount that the Secretary could pay directly to Bartels for his court representation was $2,104.15.[9] That amount was paid to him on May 18, 1988 (Pet. App. 3a-4a).

Awards for legal representation at the agency level are not limited to 25 percent of back benefits, although the same limitation on withholding of back benefits for direct payment applies (42 U.S.C. 406(a)). Thus, the Secretary here authorized an additional $2,000 fee to Bartels for such work, even though that meant that the total authorized attorney fees on this account exceeded 25 percent of past-due benefits. But, in light of the statutory limitation on withholding of benefits for direct payment, the Secretary directed Bartels to recover that additional amount from petitioner.[10]

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[8] The petition does appear to argue (Pet. 12) that the court order directed the Secretary to pay Bartels $3,068 ($3,008 attorney fees plus $60 costs). That contention overlooks the plain terms of the order, which recognizes the 25 percent limitation. App., *infra*, 3a.

[9] The Secretary might have concluded that there remained only $1,104 for direct payment to Bartels. Twenty-five percent of the back benefits here equaled $6,104. Attorney Stanley had promptly applied for and received direct payment of $5,000 of that. Because Stanley was later directed to repay $1,000 to petitioner Trekas, the Secretary concluded that $2,104 remained available for direct payment to Bartels. The Secretary could at least equally logically have concluded that since Stanley made the repayment to Trekas, not to the Secretary, there was only $1,104 of Trekas's back benefits remaining in the Secretary's possession for payment over to Bartels.

[10] The petition asserts (Pet. 2-3) that 20 C.F.R. 404.1720, 404.1730, and 404.501 require the Secretary to withhold and pay over these fees from back benefits or to pay the attorney and recoup the amount from current benefits. This reading would place the regulations in direct conflict with the statutory limitation in Section 406(a).

3. Bartels apparently bases his demand for sanctions against the Secretary largely on his claim that he has been inconvenienced by the delay in payment of his fee.[11] Petitioner Trekas was awarded disability benefits in September 1985, and in January 1986 Bartels filed his application for a fee for judicial work related to the April 1984 judicial remand. When the district court had still not acted on that application by December 1986, it was not unreasonable for the Secretary to conclude that fifteen months after the award of benefits, the balance of those benefits should finally be paid over to Trekas. At that time, Stanley's fees had been paid directly to him, Bartels had not applied to the Secretary for fees for his work at the agency level, nor had he received a court order directing payment to him of fees for his judicial representation. Although the statute contains no time limitation,[12] it is clearly unfair to disabled claimants for the Secretary to withhold indefinitely the back benefits due them in anticipation of the possible future award of attorney fees. In these circumstances, any

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[11] Petitioner fails to cite any legal error by either court below. Petitioner states he filed this petition "to direct the Court's attention to actions of the Secretary of Health and Human Services which greatly discourage attorneys from representing Social Security disability claimants" (Pet. 6). Even if his allegations were true, they would not be a valid reason for granting review on certiorari. Cf. Sup. Ct. R. 17.

[12] The Secretary's regulations do contain a time limit for agency fee requests. They provide (20 C.F.R. 404.1730(c)) for the mailing of a notice to the attorney if no fee request is received within 60 days of the award of benefits to the claimant; unless a request for attorney fees for work performed at the agency level is received within 20 days of the mailing of that notice or any extensions that may be granted, "the collection of any approved fee is a matter between the attorney and the claimant represented" (20 C.F.R. 1730(c)(2)(ii)). The notice was mailed to attorney Bartels on October 5, 1985; he did not file his request for fees with the agency until August 3, 1987. Attorney Fee Case—Past Due Benefit Summary.

inconvenience Bartels has suffered in this case must be weighed against the inequity of indefinitely withholding from the disabled beneficiary the compensation to which he has been determined to be entitled.[13]

4. In sum, the record amply supports the district court's findings that the Secretary does not have a policy of inadvertently releasing all past-due benefits to beneficiaries and does not intentionally contravene attorney fee orders in an attempt to hinder the collection of attorney fees (Pet. App. 5a). The court of appeals adopted those findings (Pet. App. 1a). There is no need for further review by this Court. *Tiffany Fine Arts, Inc.* v. *United States,* 469 U.S. 310, 317-318 n.5 (1985); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.,* 336 U.S. 271, 275 (1949).

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[13] The petition (at 9-10) refers to other cases in which the Secretary assertedly has erroneously paid out back benefits that should have been retained for the direct payment of attorney fees. Both courts below found that the Secretary has no practice of making such erroneous payments, and Bartels' bare assertion that the Secretary's behavior in other cases was inappropriate is entitled to little weight in disputing that concurrent factual finding.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1989

APPENDIX

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

Case No. LR-C-82-619

CLIFFORD TREKAS, PLAINTIFF

VS.

OTIS R. BOWEN,
SECRETARY OF HEALTH AND HUMAN SERVICES, DEFENDANT

[Filed July 28, 1987]

ORDER

Currently pending before this Court is the Petition for Attorney's Fees submitted and filed by the plaintiff's attorney, Anthony Bartels. The maximum allowable fee is twenty-five percent of plaintiff's back pay. The Court, however, may not unquestioningly approve an award solely on the basis of a contingency fee contract. *Galbreath v. Bowen,* 799 F.2d 370 (8th Cir. 1986); 20 C.F.R. §§ 404.1725 and 404.1730.

In each case the Judge must assess the value of the lawyer's services to the client in the judicial proceedings. *MacDonald v. Weinberger,* 512 F.2d 144, 147 (9th Cir. 1975); *McKittrick v. Gardner,* 378 F.2d 872 (4th Cir. 1967). The attorney-client agreement is a consideration,

but the final fitting of the fee to the services remains the duty of the Court. *Fenix v. Finch,* 436 F.2d 831 (8th Cir. 1971); *Robinson v. Gardner,* 374 F.2d 949, 952 (4th Cir. 1967). *See also Blankenship v. Schweiker,* 676 F.2d 116 (4th Cir. 1982).

In this case the attorney has claimed 36 hours and 20 minutes for the representation provided at the District Court level. The plaintiff has objected to the attorney receiving any fee for his representation in this case and has submitted various documents in an effort to show that he had discharged Mr. Bartels during the pendency of this case. Among these documents is a letter from a Social Security Administration claims representative, Mrs. M. Patton, dated 2-29-84. This letter states that Mr. Bartels has agreed to forward the plaintiff's file to a different attorney. The letter is corroborated by Mr. Bartels' time records which show that he charged plaintiff for a 20 minute phone call from Mrs. Patton on 2-9-84.

Because it appears that any work performed by Mr. Bartels after 2-9-84, was done without the consent of the plaintiff, the Court finds that it may not grant attorney's fees for such representation. The Court finds, however, that the 30 hours and 5 minutes charged for representation prior to that date were proper and fees must be granted accordingly. In light of counsel's experience, reputation, and ability, and in light of the contingency nature of this lawsuit, the Court finds that $100.00 is a reasonable hourly rate.

The Court, being fully advised, does hereby find that Anthony Bartels is entitled to an attorney's fee in the amount of $3,008.30 for the time spent in representation before this Court, and costs of $60.00, pursuant to 42 U.S.C. § 406(b)(1). *See McDonald v. Weinberger, supra; Fenix v. Finch, supra;* 20 C.F.R. § 404.1728.

The Court further finds that the plaintiff is not entitled to recover his fee from the United States under the Equal Access to Justice Act (EAJA), 28 U.S.C.A. § 2412. While the Court determined that this case should be remanded for further development, the Secretary's decision was not without substantial justification. Thus, the EAJA does not apply.

The Court notes that it has no authority to award attorney's fees for representation of a claimant before the Secretary at the administrative level. That power has been granted exclusively to the Secretary by 42 U.S.C. § 406(a). *Fenix v. Finch, supra,* 436 F.2d at 838. Consequently, the plaintiff's attorney must petition the Secretary for any fees requested in relation to representation at the administrative level. The Secretary will then coordinate any fees granted for such representation with the amount granted by the Court so that the maximum allowed fee will not exceed twenty-five percent of the plaintiff's past due benefits.

THEREFORE, it is Ordered and Decreed that an attorney's fee and costs in the amount of $3,068.30 from the past due benefits due the plaintiff herein, are hereby allowed to Anthony Bartels, the plaintiff's attorney, pursuant to 42 U.S.C. § 406(b)(1). The defendant is hereby ordered to compute, certify and pay said attorney this sum, in addition to any fees found to be due for representation at the administrative level, or twenty-five percent of the plaintiff's past due benefits, whichever sum is less.

It is further Ordered that the petition filed by plaintiff's attorney for attorney's fees pursuant to the EAJA should be, and is hereby, denied.

IT IS SO ORDERED this 27th day of July, 1987.

/s/ GARNETT THOMAS EISELE

Garnett Thomas Eisele
United States District Judge

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